U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17570790

Date: SEP. 09, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, [redacted] film actress, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the Petitioner met the initial evidentiary requirement through either a one-time achievement (a major, internationally recognized award) or meeting three of the criteria under 8 C.F.R. § 204.5(h)(3).

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

> (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
>
> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate

international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles). The regulation at 8 C.F.R. § 204.5(h)(4) allows a petitioner to submit comparable material if he or she is able to demonstrate that the standards at 8 C.F.R. § 204.5(h)(3)(i)-(x) do not readily apply to the individual's occupation.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is [redacted] film actress who has appeared in many films and videos. The evidence shows that she has received several [redacted] industry awards and been nominated for others. She states that she intends to continue working in this field as an actress in the United States.

A. Evidentiary Criteria

The Petitioner initially claimed to be a recipient of major, internationally recognized awards based upon her receipt of the [redacted]" award in 2015 and 2016, as well as wins in other categories in later years. However, the Director concluded that these awards did not qualify as major, internationally recognized awards, and the Petitioner does not challenge this decision with any specificity or offer additional arguments on appeal. We therefore consider this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

Because the Petitioner has not established that she has received a major, internationally recognized award, she must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Director concluded that the Petitioner met two of the evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), relating to lesser nationally or internationally recognized awards for excellence in her field, and published media about her and her work in the field. After review, we agree with those conclusions.

On appeal, the Petitioner reasserts her previous claims that she also meets the evidentiary criteria relating to a leading or critical role, the display of her work at artistic exhibitions or showcases, and

commercial success in the performing arts.[1] After reviewing all of the evidence in the record, we find that the record does not support a conclusion that she meets the requirements of any of these criteria, and thus does not meet the initial evidence requirement for the requested classification.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.* 8 C.F.R. § 204.5(h)(3)(vii)

In his decision to deny the Petitioner's petition, the Director concluded that this criterion applies only to the display of physical works of art such as sculptures and paintings, not to musical or acting performances. He relied for this interpretation upon the district court decision in *Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008). However, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Notably, the plain language of this criterion does not specify a particular form that a Petitioner's work must take in order to meet this criterion, only that it be displayed at an artistic exhibition or showcase.[2] We therefore withdraw that aspect of the Director's decision.

The Petitioner responded to the Director's request for evidence (RFE) by highlighting evidence that her image appeared on billboards promoting an industry convention in [redacted] as well as on box covers for DVDs of her movies. On appeal, she adds that her films and videos have appeared on streaming services, television, and at various exhibitions, such as the [redacted] awards and trade show. However, in neither of these responses has she explained or established why these should be considered to be artistic in nature. We note that in her RFE response, the word "artistic" was used only in the title of the section addressing this criterion, not to specifically refer to any of the displays of her movies, whereas evidence was submitted under a different criterion regarding the commercial value of the appearance of her work on streaming services, websites, and DVDs.

As for the conventions and award shows, the evidence indicates that the Petitioner served as a [redacted] for several of the [redacted] conventions in [redacted] which included being personally available to take pictures with and sign autographs for attendees, and on one occasion accepted an award via Facetime. Similarly, for the [redacted] convention and award show in [redacted], she appeared on promotional material for the event. But while the evidence states that these conventions included live performances, autograph booths, and product exhibitions, it does not show that the Petitioner's movies were shown at these venues. Further, even if the movies, or snippets of the movies, were shown, these events have not been shown to be artistic in nature, but rather are focused on the

[1] As with her claim to have received a major, internationally recognized award, the Petitioner also does not specifically contest the findings of the Director relating to two additional criteria under 8 C.F.R. § 204.5(h)(3)(ii) and (vi). For the same reason her claim to a major, internationally recognized award has been abandoned, we will also consider her claims to those criteria abandoned.

[2] See 6 USCIS Policy Manual F.2(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2, stating that in the first step of the two-step adjudication of petitions under this classification, USCIS officers should determine only if the evidence objectively meets the regulatory criteria.

promotion of actors, products, and business in the [redacted] industry. Therefore, for all of these reasons, the Petitioner has not established that she meets this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii)

To meet this criterion, a petitioner must show that they played a role which was leading or critical for an organization or establishment, and that that organization or establishment has a distinguished reputation. If a petitioner claims to have served in a leading role, the evidence must establish that the alien is (or was) a leader. A title, with appropriate matching duties, can help to establish if a role is (or was), in fact, leading. On the other hand, if a critical role is claimed, the evidence must establish that the petitioner has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. A supporting role may be considered "critical" if the petitioner's performance in the role is (or was) important in that way. It is not the title of the petitioner's role, but rather the alien's performance in the role that determines whether the role is (or was) critical.[3]

The Petitioner initially submitted letters from several businesses in the [redacted] industry in support of this criterion, including [redacted], and [redacted]. Evidence was also submitted regarding her activities for other companies, including [redacted], and [redacted]. In responding to the Director's RFE, the Petitioner stated that she "stand[s] by our original submission." The Director determined that the Petitioner had not established that she played a qualifying role for these organizations, or that any of them have a distinguished reputation.

On appeal, the Petitioner again asserts that she meets this criterion based on her role with most of these organizations, and submits new evidence pertaining to these and other establishments. While she refers to section 3.8(b) of the *AAO Practice Manual* for the proposition that we will accept new evidence on appeal, we note that she specifically declined to submit such evidence when it was requested by the Director. Where, as here, a Petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). In addition, the majority of this new evidence is dated after the filing of the petition, and either relates to events that occurred after that date or to an unknown date. The Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). We will therefore limit our review to the evidence in the record at the time of the Director's decision.

This evidence includes a letter from [redacted] project organizer for [redacted], who verifies that the Petitioner was featured "in the past several conventions" as a '[redacted]," meaning that she had a booth at the convention and worked with the company to promote the convention. [redacted] also writes that the Petitioner was selected to moderate the main stage at the convention. However, she does not indicate that the Petitioner acted as a leader, either for the convention or the company itself, or that her role as a [redacted] was critical to any success that the company may

[3] See 6 USCIS Policy Manual F.2(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

have enjoyed. A webpage which the Petitioner states is for [redacted] shows pictures of more than 60 actors, and thereby detracts from any claim that she held a leading position for the company.

Another letter was written by [redacted] CEO of [redacted], who indicates that his company worked with the Petitioner to create figurines [redacted] of her for sale, along with other [redacted] actresses. He states that the 3D model of the Petitioner is "one of our top selling items." But other than serving as a model and allowing herself to be scanned and photographed, presumably for a licensing fee, he does not state that the Petitioner played a critical role for the company, and there is no suggestion that she acted as a leader in this role.[4]

In support of her role with [redacted] the Petitioner initially submitted a letter from its CEO, [redacted] He writes that the company, a producer of [redacted] DVDs, works most frequently with the Petitioner in producing feature length films. [redacted] adds that the Petitioner's DVDs are "the most popular and most viewed," and that the company has "sold many of DVDs featuring" her. We note that an article posted on the website [redacted] states that the Petitioner and her husband founded and own this company, which it describes as a holding company, as well as its subsidiary [redacted] The article also quotes the Petitioner as explaining that at the time (October 2017) the company consisted of she and her husband and three other employees. This evidence is sufficient to demonstrate that the Petitioner plays a leading or critical role for [redacted]

However, the Petitioner has not established that [redacted] has a distinguished reputation. [redacted] states in his letter that the company produced 10 DVDs in 2017, and "is currently building [redacted] s biggest B2C (business to consumer) [redacted] website, B2B (business to business) distribution platform, and is highly invested in [redacted] 's biggest [redacted] companies." However, these statements are not supported by independent, documentary evidence. A page from the website [redacted] shows several DVDs featuring the Petitioner as listed for sale, but this evidence does not speak to the company's reputation beyond confirming its production of a small number of DVDs. Further, the article on [redacted] comments upon the Petitioner's reputation, which it indicates led to the foundation of [redacted] but not on the company's reputation. The evidence is therefore insufficient to establish that [redacted] or its subsidiary [redacted] has a distinguished reputation.

The Petitioner also continues to assert that she plays a leading or critical role for [redacted] which she describes as "[redacted]." The August 18, 2017 article on [redacted] described above states that is "the official spokesperson for [redacted] which it describes as "[redacted]" The Petitioner's position with this company is also confirmed by other media articles in the record, as well as an article about the company's anniversary party in a [redacted] magazine, [redacted] However, this evidence does not confirm that as a spokesperson, the Petitioner served in a leading or critical role. Notably, the evidence does not include details about this role from officials of the company, such as the ways in which she acted as spokesperson and any positive impact that she had on the company as a spokesperson.

[4] We note that on appeal, the Petitioner submitted a second letter from [redacted] dated December 29, 2019 and stating that the Petitioner joined the company as its CEO and leading consultant. Even if we were to consider this new evidence on appeal, it has minimal evidentiary weight, as the letter is not signed by [redacted] and does not explain why he continues to identify himself as the company's CEO.

Even fewer details were submitted regarding her role as [redacted]" for [redacted], with the evidence limited to two similar press releases which appeared on [redacted] and [redacted] As these appear to be mainly promotional in nature and do not provide details about the Petitioner's duties in this role, this evidence does not show that the Petitioner played a leading or critical role for this establishment.

After review of all of the evidence submitted in support of this criterion, we agree with the Director's conclusion that the Petitioner does not meet this criterion.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.* 8 C.F.R. § 204.5(h)(3)(x)

The Petitioner submitted several types of evidence under this criterion, including screenshots showing the number of times her movies or videos had been viewed, as well as evidence related to the sale of physical DVDs featuring her and receipts for subscription services that allow customers to view her movies and videos. In his decision, the Director concluded that since this evidence did not include box office receipts and sales receipts, the Petitioner did not meet this criterion. Also, the Director noted that the figures calculated by the Petitioner's representative were not supported by evidence in the record.

The record includes pages from several websites, including in some instances the Petitioner's profile page on those websites, which shows the number of times that videos featuring her as an actress have been viewed. The Petitioner asserts that due to the changing nature of the way movies and videos are viewed, and the evidence of the effects of the COVID 19 pandemic on box office sales as movie theatres in the United States closed for most of 2020, the number of views of the movies and videos in which the Petitioner appeared should be considered as comparable to the type of evidence called for under this criterion.

We first note that in her appeal brief, the Petitioner refers to guidance from the USCIS Policy Manual relating to the O-1 nonimmigrant visa classification for her interpretation of the comparable evidence regulation at 8 C.F.R. § 204.5(h)(4), instead of the section of the USCIS Policy Manual pertaining to the immigration benefit sought. In addition, despite claiming that this criterion does not apply to her occupation, the Petitioner has submitted evidence pertaining to sales of DVDs featuring her work, as well as receipts from a website which operates on a subscription model for the viewing of her work. She has therefore not established that this criterion does not apply to her occupation.

However, assuming *arguendo* that she has established that this criterion does not apply to her occupation, and that the type of evidence she has submitted is in fact comparable to that specifically called for under this criterion, the Petitioner has still not established that she has enjoyed commercial success as a performing artist. First, regarding the number of times her videos and movies have been viewed or streamed across multiple websites, the Petitioner does not provide an exact or even approximate figure, stating only that this number is in the "tens of millions." Although the evidence does include evidence of those numbers from some of these websites, including the Petitioner's profile page on [redacted] showing that her videos have been viewed a total of 5.5 million times, the evidence from other websites such as [redacted] show far fewer, and the record lacks evidence of

the total number of views from other websites she mentions. Vague estimations which are not supported by documentary evidence cannot form the basis of a successful claim under this criterion.

In addition, the Petitioner has not submitted evidence to establish that a certain quantity of streams or views of her videos and movies, whether considered individually or as a whole, can serve as a gauge of commercial success. On appeal, she puts forth the following explanation:

> The more streams a film garners the more popular it is and the more revenue it generates. Streaming sites… generate revenue through ad sales. The more streams or views a film garners, the more the streaming site charges for ads. In the world of the internet, the more persons attracted to a website, the more advertisers pay to be placed on that website.

While we do not dispute this general description of the business model used by some websites, it describes only an indirect connection between the number of views or streams of an individual's work and any commercial success it may enjoy. For that reason, the evidence submitted by the Petitioner is insufficient to show that is insufficient that her videos and films which have been streamed and viewed on such websites have been commercially successful.

The Petitioner also submitted some evidence of sales of DVDs featuring her work, some of which is as vague as the evidence of the number of streams and views. For example, [redacted]'s letter states only that "we have sold many of DVDs featuring" the Petitioner, despite the evidence in the record showing that [redacted] is a subsidiary of a holding company founded and led by the Petitioner and her husband. Another letter from [redacted], CEO of [redacted], a company which produces and distributes [redacted] states that 12 videos featuring the Petitioner are "incredibly popular and are high sellers for us." More precise information was submitted in response to the Director's RFE, including a letter from [redacted], CEO of [redacted] who writes in a March 9, 2020 letter that "the last 2 years we sold more than 8500 movies" featuring the Petitioner, priced around 30 euros each. However, as noted in the Director's RFE, the number of sales alone are insufficient to demonstrate that the Petitioner's DVDs have been commercially successful, and the Petitioner has not provided evidence that this level of sales is considered commercially successful in her industry.

Finally, the Petitioner also submitted evidence of revenue generated through websites using a subscription or similar model for access to her videos and films. The information from the website [redacted] shows links for films featuring her, as well as the number of tickets needed to view them and the number of times they have been viewed. She also submitted a list of monthly earnings from the website [redacted] with the Petitioner receiving between $2600 and $4600 per month between January 2019 and August 2020. As noted by the Director in his decision, counsel's calculations based upon the data from [redacted] are not supported by the evidence. In addition, the data from [redacted] is, like the information regarding sales of DVDs featuring the Petitioner, insufficient by itself to establish commercial success. She does not offer further arguments regarding this evidence on appeal.

For all of the reasons stated above, the Petitioner has not established that she meets this criterion.

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown that the significance of her work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and that she is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated her eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.